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No. 80-2043

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26, *et al.*,
*Petitioners*,

v.

STEVEN A. PICO, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

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ROBERT M. WEINBERG *
MICHAEL H. GOTTESMAN
GARY L. SASSO
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

*Attorneys for Amicus Curiae National Education Association*

* Counsel of Record

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### INTEREST OF THE *AMICUS CURIAE* *

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educational institutions. The organization is deeply committed to preserving and fostering academic freedom in all its aspects. Thus, NEA's governing resolutions urge, among other things, "the removal of laws and regulations which restrict the selection of a diversity of instructional materials or which limit educators in the selection of such materials"; that supplementary instructional materials

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* The parties have consented to the filing of this brief, which is submitted in support of the respondents in this case.

"contain a number of points of view to allow students to become familiar with the attitudes and recommendations of various segments" of the populace; and that "controversial issues should be a part of instructional programs when . . . appropriate to the curriculum and to the maturity level of the student." NEA endeavors to advance these precepts through persuasion, collective bargaining, legislative efforts and, when necessary, litigation. These interests of NEA are directly implicated in the issues before the Court in the instant case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court in this case entered summary judgment for defendants, thus rejecting—without benefit of trial—plaintiffs' claims that defendants' challenged actions were motivated by considerations impermissible under the First Amendment. The Second Circuit, in the decision now under review, reversed upon determining that the record contained sufficient evidence that defendants acted with impermissible motives to warrant a trial of plaintiffs' claims. Thus, the issue in this case is not whether plaintiffs have conclusively proved their claims, but whether plaintiffs are entitled to a full opportunity to prove them at trial. The resolution of this issue depends upon whether plaintiffs' claims, if proven, would as a matter of law warrant relief, and upon whether plaintiffs have adduced sufficient evidence in support of their claims to create genuine issues of material fact. Plaintiffs have crossed both of these hurdles.

The controversy in this case arose when petitioner Board of Education ordered the removal of nine books from the libraries of all junior and senior public high schools in the Island Trees Union Free School District and prohibited the use of the books in the curricula of those schools. Plaintiffs adduced evidence before the District Court—including, *inter alia*, admissions by the Board president—that "conservative principles" under-

lay the Board's action in this case. *Pico* v. *Board of Educ.*, 474 F.Supp. 387, 391 (E.D.N.Y. 1979). The Board president stated that he objected to the books partly because of "their irrelevance . . . to the values which [he], as a board member and president, [felt] the community wishe[d] inculcated in its youth." *Id.*, at 392. And the defendants acknowledged that the "dominant factor" motivating the Board's expungement of the books was the Board members' "conservative philosophy of morals and traditional values. . . ." *Ibid.* The "conservative philosophy . . . and traditional values" that the Board meant to uphold were indicated by the particular books suppressed and the reasons the Board gave for the suppression. Thus, for example, in pursuit of its goal of excluding "anti-American" [1] books, the Board disapproved the book, *A Hero Ain't Nothing But a Sandwich*, because it discussed the fact that George Washington was a slave owner, and the book, *A Reader for Writers*, partly because it "equate[d] Malcolm X[,] considered by many to be a traitor in this country, with the founding fathers of our country." Ahrens Affidavit, A-1.[2]

We do not dispute that school authorities may properly endeavor to inculcate in students those "fundamental values necessary to the maintenance of a democratic political system" as well as those skills that prepare students for effective "participation as citizens" in a democratic society. *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925).

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[1] 474 F.Supp., at 390.

[2] The quote is from a document produced by a politically militant parents group that influenced the Board's action in this case. The document is attached as an exhibit to the Board president's affidavit and was incorporated into the affidavit by reference. Ahrens Affidavit, ¶¶ 6, 10. See *Pico* v. *Board of Educ.*, 638 F.2d 404, 407-408 (2d Cir. 1980). The significance of the political views of the above-mentioned parents group to the Board's decisions challenged in this case is, at the least, a factual issue that bears full exploration at trial.

Nor do we deny that school officials possess broad discretion to determine how best to accomplish these ends. But we will demonstrate herein that the First Amendment limits both the subjects of permissible governmental indoctrination of school students entrusted to the state's charge, and the methods by which the state may pursue indoctrination even as to permitted subjects. The record in this case contains factual issues as to whether these limitations were exceeded in this case.

In part I, *infra*, we show that the First Amendment restricts the subject areas in which the state may adopt, and seek to inculcate in students, a particular point of view. While school officials may permissibly attempt to impart those skills that make for full and effective participation in all facets of our society and to transmit the basic "values on which our society rests," *Ambach* v. *Norwick*, 441 U.S., at 76, they may not seek to instill in students a preference for a particular side in matters of political or social opinion that are open to genuine controversy within our society. There is evidence in this case that the school board's suppression of at least some of the nine books was motivated by disapproval of ideas that the state was not constitutionally free to condemn.

In part II, *infra*, we show that even assuming *arguendo* that the school board's intention in this case was to preserve and transmit values that the state is free constitutionally to instill, there is at least a triable issue whether the method chosen to accomplish those objectives was consistent with the First Amendment. As to those subjects in regard to which a school board may properly seek to presuade students to a particular point of view, it may do so by such means as reason, explanation, example, and rebuttal; but it may not, absent compelling reasons, do so by purposefully insulating students from facts or arguments that support a competing view. This is not to say that school authorities cannot exclude educational materials for any number of reasons un-

related to the state's disagreement with the social or political views expressed therein. But the state abuses its power when it undertakes such exclusion simply to deny students exposure to views not favored by the state. The record in this case contains evidence that the Board violated this principle.

## ARGUMENT

### I. LIMITATIONS ON SUBJECTS OF INDOCTRINATION

#### A. The Constitutional Principle

As this Court has recognized, the state has a legitimate interest in "prepar[ing] individuals for participation as citizens" and in perpetuating "the values on which our society rests." *Ambach* v. *Norwick*, 441 U.S., at 76. So that the state may advance this legitimate and important interest, it has been accorded wide latitude and granted appreciable power regarding the education of the young. As this Court has held, a state may "require that all children of proper age attend some school [and] that certain studies plainly essential to good citizenship . . . be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). In this connection, school authorities may properly undertake to instill respect for democratic institutions, obedience to the law, concern for the rights of others, a love of freedom, and other "fundamental values necessary to the maintenance of a democratic political system." *Ambach* v. *Norwick*, 441 U.S., at 77; see, *e.g.*, *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 631 (1943). Although, as we shall elaborate in part II below, the state may not, consistently with the First Amendment, pursue these ends by any means it chooses, there can be little question about the legitimacy of the ends themselves.

The values that the state may permissibly seek to inculcate in the young are not, however, unlimited. Although, as we have seen, the state may seek to instill

those "fundamental values necessary to the maintenance of a democratic political system," the state may not manipulate the content of education for the purpose of indoctrinating students toward or away from particular viewpoints on matters of political or social opinion that are open to genuine controversy within our society. As this Court held in *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 642: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." Put another way, "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." *Bellotti* v. *Baird*, 443 U.S. 622, 638 (1979) (plurality opinion, emphasis in original). The First Amendment guarantees of free inquiry, free thought, free belief, and free expression would mean little if school authorities could nip debate in the bud by imposing an ideological orthodoxy on our nation's youth. Thus, it is evident that a school board could not use the public schools to promote allegiance to a particular political party, or to instill in students a particular view on such current social or political issues as voluntary affirmative action programs, legalized abortion, or the proposed Equal Rights Amendment. Nor could it seek to imbue students with a particular opinion as to the merit of lawful social movements or as to the worth of given social or political leaders.[3]

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[3] All members of the panel below, including the dissenter, apparently accepted the basic principle described hereinabove. See 638 F.2d, at 414-417, 428, 432-437. The majority held that trial was necessary to establish whether this principle had been breached in this case. Judge Mansfield dissented, in belief that defendants had factually demonstrated that they had not been motivated by a desire to "inculcate students with any particular social or political views (e.g., legalized abortion or anti-abortion, adherence to the views of any political party or religion, promotion of the Equal Rights Amendment or the like)." *Id.*, at 428.

To deny the state authority to attempt to instill in public school students particular points of view on subjects of legitimate controversy is not to deprive the state of discretion to which it must practicably and legitimately lay claim.

> * * * To enforce those [limitations] . . . is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.
>
> The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

*West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 637.

Thus, control by school authorities over educational content is not without constitutional limits. The state may not shape that content based on support or disdain for particular viewpoints on issues that are the subject of legitimate debate in a democratic society. The state may sponsor only such values as are truly basic to our political and social structure. It remains to be shown that there is a genuine factual dispute with respect to whether defendants exceeded this constitutional limit. We turn next to that question.

### B. The Record in this Case Presents a Triable Issue Whether the School Board's Action Constituted Impermissible Disapproval of Controversial Political or Social Viewpoints

The record in this case reflects genuine factual disputes with respect to (1) the question whether the Board's action was motivated by disapproval of certain values or opinions and (2) the question whether the values or opinions on which the Board passed judgment were among those that school authorities could properly condemn in determining educational content. Accordingly, plaintiffs should be afforded a trial on the issue whether the Board's action in this case constituted state indoctrination in impermissible subject areas.

#### 1. *The Board's Indoctrinative Purpose*

Defendants' admissions alone furnish evidence sufficient to defeat summary judgment on the issue whether defendants' action in this case was ideologically motivated. The Board president averred in an affidavit that he was "a conservative" and "[i]t is to this that [he] attribute[d] [his] re-election on a number of occasions." Ahrens Affidavit, ¶ 2. He further declared that "[w]e are representing the community which first elected us and re-elected us and our actions have reflected its intrinsic values and desires." *Id.*, ¶ 18. The Board vice-president testified similarly that he was "basically conservative" and that his "six fellow board members feel the same way and further that this is representative of our community." Martin Affidavit, ¶ 2. And he intimated that the Board's action was undertaken to "inculcate[]" "community values [in the] student population." *Id.*, ¶ 8. Defendants stipulated that their "evaluation of the suitability of the books was based, in part, on [their] personal values, morals, [and] tastes." Defendants' Rule 9g Statement, ¶ 1(4). And, as already noted, defendants have submitted that their "conservative philosophy of morals and traditional values was the dominant factor"

motivating their action. 474 F. Supp., at 392. There is ample evidence, then, that the Board acted in this case with a purpose to influence the values that would be held by junior and senior high school students under its charge.

### 2. *The impermissibility of the Board's Purpose*

While defendants have acknowledged that a "conservative philosophy of morals and traditional values" underlay their action in this case, that phrase may encompass permissible subjects for state indoctrination, impermissible subjects, or both. Thus, the question remains whether any ideas and perspectives the Board sought to suppress were among those that school authorities may permissibly condemn. The record in this case contains evidence readily susceptible of the inference that the Board ventured into forbidden territory.

As we have noted, one of the works excluded as "anti-American" was *A Hero Ain't Nothing But a Sandwich*. When asked what might have been regarded as anti-American about the book, the Board president suggested that "someone might have felt [that] some of the things said . . . regarding George Washington being a slaveholder" were anti-American. Ahrens Deposition, at 89. The vice-president of the Board testified along the same lines. In fact, he read a passage from the book that he thought might be regarded by the community as offensive. The passage related a black teacher's musings to her class on George Washington:

> Only two pictures on my wall when I came here. George Washington and Abraham Lincoln. Abe was at least involved with the Civil War and the emancipation thing, but George was a slaveholder, and it is impossible to hang George over my front blackboard and not discuss him. When I discuss him, I don't go by what's in these history books or we'd be dealin' in lies. George was a slaveholder. And he had it put in his will to free alla his slaves after

> his death. But he owned a slave woman whose cookin' was so fine that he freed he[r] while he was livin'. She musta really known how to barbeque.

Martin Deposition, at 21-22. These facts are susceptible of an inference that the Board acted with a purpose to conceal a particular historical perspective on an issue of social importance. Were that the case, the Board's inculcative efforts could not be justified as within the ambit of the state's legitimate concerns. Whatever the bounds of the First Amendment proscription, at the least the First Amendment does not permit state promulgation of revisionist histories nor official inculcation of a distorted view of the roots of current and pressing social problems.

Similarly, there are indications that *A Reader for Writers* was excluded from the libraries and curricula because it "equate[d] Malcolm X[,] considered by many to be a traitor to this country, with the founding fathers of our country." Ahrens Affidavit, A-1.[4] In this instance, too, the Board may have acted unconstitutionally. It is far from evident how resolution of competing views regarding the appropriate stature of Malcolm X is consistent with the First Amendment, and thus the legitimate business of public school authorities.

At the least, these instances permit the inference that the Board was acting with purposes that are forbidden to the state by the First Amendment. On this record, then, plaintiffs are entitled to a trial of their claims against defendants.

## II. LIMITATIONS ON INDOCTRINATIVE METHODS

### A. The Constitutional Principle

In part I, we contended that the Board in this case may well have ventured outside the area of its proper concern by undertaking to foster values other than those—

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[4] See *supra*, note 2.

and perhaps antithetical to those—that are basic to our democratic tenets. Our argument was directed, then, at the subjects of Board indoctrination. In this section, we maintain that, even on those subjects where the state is free to indoctrinate, the Constitution limits the methods of permissible indoctrination.

We do not contend that the First Amendment limits the state's ability to select or exclude materials based on, for example, readability, thoroughness of treatment, intellectual coherence, or amenability to teaching, or on such practical considerations as budgetary constraints, availability of materials, or time limitations. But we do contend that the state abuses its authority when, absent compelling reasons,[5] the state, for the very purpose of insulating students from political or social views disfavored by the state, acts to suppress such views.

School authorities have available to them a variety of constitutionally acceptable means of transmitting those values that are the subject of permissible state indoctrination, described in part I, *supra*. Notably, such values may be transmitted by processes of reason, explanation, example, emphasis, and rebuttal. Thus, as this Court has observed, a state may require "instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty," and thus "inspire patriotism and love of country." *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 631, quoting *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 604 (1940) (dissenting opinion). Through "present[ation] and expl[anation] [of] subject matter in a way that is both comprehensible and inspiring," and through teacher "example," a public school may legitimately "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach* v. *Norwick*, 441 U.S., at 78-79.[6]

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[5] See note 10, *infra*.

[6] As explained in part I, the state is not free to place its weight on one side of matters of political or social controversy—even by

The methods available to the state to achieve its indoctrinative aims, however, are not without constitutional limits. A school board may *not*, absent compelling reasons,[7] inculcate particular views by purposefully suppressing significant facts or opinions conveying or supporting competing views. For example, while the state may permissibly teach respect for the American flag, it could not do so by excluding books from the public school libraries *for the reason that* such books mention the instances in our history when flags have been burned in political protest.[8] Cf. *West Virginia St. Bd. of Educ.* v. *Barnette*, *supra*; *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). And, assuming arguendo that the state could permissibly instill a favorable point of view about a particular American president, it could not do so by excluding books from school libraries and curricula for the reason that such books mention flaws in that president's conduct. Cf. pp. 9-10, *supra*. That mode of inculcation, however expedient, is repugnant to First Amendment values. As this Court has explained, "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."

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means of emphasis or persuasion—but may take a position only with respect to those "fundamental values necessary to the maintenance of a democratic political system."

[7] See note 10, *infra*.

[8] We emphasize "for the reason that" to make clear the limits of the proposition we assert. We are not contending that the absence of "flag burning" books from the library or curriculum of a school that teaches respect for the flag would, without more, raise any constitutional problem. The state has no affirmative obligation to stock school libraries with books containing competing views on every issue. Our argument is simply that state decisions regarding educational content cannot be motivated by a desire to keep students in the dark about matters competing with state-sponsored views.

*Tinker* v. *Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 511 (1969). Put another way, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Moreover, ideas and values that a school board might permissibly attempt to promote should hold their own in the marketplace of ideas. Indeed, "teaching" by intentionally closing off sources of competing views may be utterly self-defeating, for it is manifestly inconsistent with the democratic values it is presumably intended to instill and fails adequately to prepare students for effective participation in a free, open, and diverse society. "Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972). And when school authorities act to suppress disfavored ideas, there is a "danger that the school, by power of example, would appear to the students to be sanctioning the very 'pall of orthodoxy,' condemned in *Keyishian*, which chokes freedom of dissent." *Ibid.* As this Court has held:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

*West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 637.

### B. The Record in this Case Presents a Triable Issue Whether the School Board Employed Constitutionally Proscribed Methods to Achieve Its Indoctrinative Ends

The Board's action in this case—removal of selected library books—necessarily insulated students from the content of the excluded materials.[9] Whether that action violated constitutional restrictions on indoctrinative methods turns on whether the books in question were excluded on ideological grounds and, if so, whether the exclusion was warranted by some compelling reason. Defendants are entitled to summary judgment on neither of these issues.

As we have shown, the record strongly suggests that defendants' action in excluding the books was ideologically motivated. See pp. 8-10, *supra*. And, at this juncture, defendants have proffered no compelling justification for imposing the restrictions in question.[10] Thus, the issue

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[9] Petitioners in their brief make much of the fact that the Board did not directly prohibit teachers from discussing the disputed books or the ideas and positions they represent. Petitioners Brief, at 4, 39-40. Although no such prohibition was expressly announced, a full evidentiary trial may confirm the inference that students and teachers would be loathe to discuss books—and the ideas they contain—that the Board singled out for exclusion from the curriculum. A trial may further establish that defendants intended to achieve this forseeable result. See majority opinions below, 638 F.2d at 418 n. 13, 437 n. 8. In any event, it is clear that by removing the books from the school library and proscribing use of the books in the school curriculum, the Board sought to insulate students from what could be fully discerned only by reading these materials. For example, upon reading the passage about George Washington quoted *supra*, at pp. 9-10, one gains certain perceptions that may not be derived from a discussion about the book. This distinction is readily apparent to anyone who has ever read a book.

[10] For an example of a possible "compelling reason", the maturity level of students in particular grades may be such that overly complex and sophisticated concepts may be excluded not-

whether defendants exceeded the First Amendment limit on indoctrinative methods must proceed to trial.

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withstanding that they rebut the state-favored view. Relatedly, certain materials may be thought too inflammatory or shocking for students of particular ages. It is important to appreciate, however, that, although a school board's judgment in this regard is entitled to some respect, it cannot be dispositive when First Amendment rights are at stake. Rather, a reviewing court must undertake its own rigorous inquiry. Courts "cannot, because of modest estimates of [their] competence in such specialities as public education, withhold the judgment that history authenticates as the [judicial] function . . . when liberty is infringed." *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S., at 640.

Although defendants have not argued that any politically motivated exclusions in which they engaged were undertaken for compelling reasons, they have contended that the exclusions in this case were motivated by disapproval of sexually explicit passages and coarse language contained in the books. This contention has relevance as a defense to the claim that defendants' action was ideologically motivated. As our discussion has shown, at pp. 8-10 *supra*, the issue whether or not defendants' action was ideologically motivated is not ripe for summary judgment.

## CONCLUSION

The Court of Appeals in this case properly reversed the District Court's Order granting defendants' motion for summary judgment. As we have established in part I, there is evidence in the record that could support a finding that the Board acted to sustain or disapprove views that were not permissible subjects for state indoctrination. And as we have demonstrated in part II, regardless of the legitimacy of the Board's ends, there is evidence that would support a finding that "the means adopted . . . exceed the limitations upon the power of the state." *Meyer* v. *Nebraska*, 262 U.S., at 402. For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG *
MICHAEL H. GOTTESMAN
GARY L. SASSO
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

*Attorneys for Amicus Curiae*
*National Education Association*

* Counsel of Record